



U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

SEP 18 1985

Honorable Augustus F. Hawkins
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is to proffer the views of the Department of Justice regarding H.R. 1524, the proposed Polygraph Protection Act of 1985.

We take no position on the policy merits of H.R. 1524. However, we do object to the bill's failure to provide an exemption for using the polygraph in situations involving employees of government contractors performing work for the government related to the national defense and national security. Despite the close working relationship between the federal government and federal contractors, employees of contractors are not considered to be government employees and, therefore, the exemption for government employees provided in Section 8 of the bill would not apply to contractor employees.

For this reason, we oppose enactment of H.R. 1524 without an amendment which would exempt government contractor employees from coverage by the bill.

The Office of Management and Budget has advised this Department that it has no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

(Signed) Phillip D. Brady

Phillip D. Brady
Acting Assistant Attorney General

[COMMITTEE PRINT]

SEPTEMBER 26, 1985,

(Showing the Amendment in the Nature of a Substitute to H.R.
1524 Adopted by the Subcommittee on Employment Opportu-
nities)

Strike out all after the enacting clause and insert in
lieu thereof the following:

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the "Employee Polygraph
3 Protection Act of 1985".

4 SEC. 2. PROHIBITIONS ON LIE DETECTOR USE.

5 It shall be unlawful for any employer engaged in com-
6 merce or in the production of goods for commerce—

7 (1) directly or indirectly, to require, request, sug-
8 gest, or cause any employee or prospective employee
9 to take or submit to any lie detector test;

10 (2) to use, accept, refer to, or inquire concerning
11 the results of any lie detector test of any employee or
12 prospective employee;

13 (3) to discharge, dismiss, discipline in any manner,
14 or deny employment or promotion to, or threaten to
15 take any such action against, any employee or prospec-
16 tive employee who refuses, declines, or fails to take or
17 submit to any lie detector test or any employee or pro-

1 pective employee on the basis of the results of any lie
2 detector test;

3 (4) to discharge or in any manner discriminate
4 against an employee or prospective employee because
5 such employee or prospective employee has filed any
6 complaint or instituted or caused to be instituted any
7 proceeding under or related to this Act or has testified
8 or is about to testify in any such proceeding or because
9 of the exercise by such employee, on behalf of himself
10 or others, of any right afforded by this Act.

11 **SEC. 3. NOTICE OF PROTECTION.**

12 The Secretary of Labor shall prepare, have printed, and
13 distribute a notice that employers are prohibited by this Act
14 from using a lie detector test on any employee or prospective
15 employee. Upon receipt by an employer engaged in com-
16 merce or in the production of goods for commerce, such
17 notice shall be posted at all times in conspicuous places upon
18 the premises of the employer.

19 **SEC. 4. AUTHORITY OF THE SECRETARY OF LABOR.**

20 **(a) IN GENERAL.**—The Secretary of Labor shall—

21 (1) issue such rules and regulations as may be
22 necessary or appropriate for carrying out this Act;

23 (2) cooperate with regional, State, local, and other
24 agencies. and cooperate with and furnish technical as-
25 sistance to employers, labor organizations, and employ-

1 ment agencies to aid in effectuating the purposes of
2 this Act; and

3 (3) make investigations and inspections and re-
4 quire the keeping of records necessary or appropriate
5 for the administration of this Act.

6 (b) SUBPENA AUTHORITY.—For the purpose of any
7 hearing or investigation under this Act, the Secretary shall
8 have the authority contained in sections 9 and 10 of the Fed-
9 eral Trade Commission Act (15 U.S.C. 49, 50).

10 SEC. 5. ENFORCEMENT PROVISIONS.

11 (a) CIVIL PENALTIES.—(1) Subject to paragraph (2),
12 whoever violates this Act may be assessed a civil penalty of
13 not more than \$10,000.

14 (2) In determining the amount of any penalty under
15 paragraph (1), the Secretary shall take into account the pre-
16 vious record of the person in terms of compliance with this
17 Act and the gravity of the violation.

18 (3) Any civil penalty assessed under this subsection shall
19 be collected in the same manner as is required by subsections
20 (b) through (e) of section 503 of the Migrant and Seasonal
21 Agricultural Worker Protection Act (29 U.S.C. 1853) with
22 respect to civil penalties assessed under subsection (a) of such
23 section.

24 (b) INJUNCTIVE ACTIONS BY THE SECRETARY.—The
25 Secretary may bring an action to restrain violations of this

1 Act. The district courts of the United States shall have juris-
2 diction, for cause shown, to issue temporary or permanent
3 restraining orders and injunctions to require compliance with
4 this Act.

5 (c) PRIVATE CIVIL ACTIONS.—(1) An employer who
6 violates the provisions of this Act shall be liable to the em-
7 ployee or prospective employee affected by such violation. An
8 employer who violates the provisions of this Act shall be
9 liable for such legal or equitable relief as may be appropriate,
10 including without limitation employment, reinstatement, pro-
11 motion, and the payment of wages lost and an additional
12 amount as liquidated damages.

13 (2) An action to recover the liability prescribed in para-
14 graph (1) may be maintained against the employer in any
15 Federal or State court of competent jurisdiction by any one
16 or more employees for or in behalf of himself or themselves
17 and other employees similarly situated.

18 (3) The court shall award to a prevailing plaintiff in any
19 action under this subsection the reasonable costs of such
20 action, including attorneys' fees.

21 SEC. 6. EXEMPTIONS.

22 (a) NO APPLICATION TO GOVERNMENTAL EMPLOY-
23 ERS.—The provisions of this Act shall not apply with respect
24 to the United States Government, a State or local gov-

1 ernment, or any political subdivision of a State or local
2 government.

3 (b) COUNTERINTELLIGENCE PROGRAM EXEMPTION.—

4 (1) Nothing in this Act shall be construed to prohibit the
5 administration, in the performance of any counterintelligence
6 function, of any lie detector test that is conducted pursuant to
7 section 1221 of the Department of Defense Authorization
8 Act, 1986.

9 (2) Nothing in this Act shall be construed to prohibit the
10 administration, in the performance of any intelligence or
11 counterintelligence function, of any lie detector test—

12 (A) to an individual assigned or detailed to the
13 Central Intelligence Agency or to any expert or con-
14 sultant under a contract with the Central Intelligence
15 Agency;

16 (B) to (i) an individual employed by, or assigned
17 or detailed to, the National Security Agency, (ii) an
18 expert or consultant under contract to the National Se-
19 curity Agency, (iii) an employee of a contractor of the
20 National Security Agency, or (iv) an individual apply-
21 ing for a position in the National Security Agency; or

22 (C) to an individual assigned to a space where
23 sensitive cryptologic information is produced, proc-
24 essed, or stored for the Central Intelligence Agency or
25 the National Security Agency.

1 (c) EXEMPTION FOR FBI CONTRACTORS.—Nothing in
2 this Act shall be construed to prohibit the administration, in
3 the performance of any counterintelligence function, of any
4 lie detector test to an employee of a contractor of the Federal
5 Bureau of Investigation of the Department of Justice who is
6 engaged in the performance of any work under the contract
7 with such Bureau.

8 SEC. 7. DEFINITIONS.

9 As used in this Act:

10 (1) The term "lie detector test" includes any ex-
11 amination involving the use of any polygraph, decepto-
12 graph, voice stress analyzer, psychological stress eval-
13 uator, or any other similar device (whether mechanical,
14 electrical, or chemical) which is used, or the results of
15 which are used, for the purpose of detecting deception
16 or verifying the truth of statements.

17 (2) The term "employer" includes any person
18 acting directly or indirectly in the interest of an em-
19 ployer in relation to an employee or prospective
20 employee.

21 (3) The term "commerce" has the meaning pro-
22 vided by section 3(b) of the Fair Labor Standards Act
23 (29 U.S.C. 203(b)).

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1 SEC. 8. EFFECTIVE DATE.

2 The provisions of this Act shall take effect on the date
3 of enactment, except for section 3, which shall take effect six
4 months after the date of enactment of this Act.

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{10-16-85}

AMENDMENT TO THE COMMITTEE PRINT OF SEPTEMBER 25, 1925,
H.R. 1524, AS REPORTED FROM THE SUBCOMMITTEE
OFFERED BY MR. ECKART OF OHIO

Page 6, after line 7, insert the following new
subsection:

- 1 (d) EXEMPTION FOR DRUG THEFT OR DIVERSION
2 INVESTIGATIONS.--This Act shall not prohibit the use of a lie
3 detector test on current employees by an employer
4 investigating a reported theft or diversion of a controlled
5 substance listed in schedule I, II, III, or IV pursuant to
6 section 202 of the Controlled Substances Act, (21 U.S.C. 812)
7 to the extent that--
8 (1) such use is consistent with--
9 (A) applicable State and local law, and
10 (B) any negotiated collective bargaining
11 agreement,
12 that explicitly or implicitly limits or prohibits the use
13 of lie detector tests on such employees; and
14 (2) the test is administered only to employees with
15 direct access to such controlled substances.